No. 2714

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

ONG SEEN, Alias ONG CHUNG LUNG,
Appellant.

vs.

ALFRED E. BURNETT, Inspector in Charge, United States Immigration Office at Tucson, Arizona,
Appellee.

Brief of Appellant

Upon Appeal From the United States District Court for the District of Arizona.

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STATEMENT OF THE CASE.

The appellant, a Chinene alien, was arrested by the appellee, Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, pursuant to a warrant of arrest issued April 16, 1914, by the acting Secretary of Labor, under Section 23, Act of Congress March 4, 1913, charging the appellant with being unlawfully in the United States in violation of the Chinese Exclusion Law. A hearing was had before the appellee at Tucson, Arizona, on April 23 and 24th, 1914, and on May 5th, 1914, at which hearings evidence was received by the appellee, from which evidence the Secretary of Labor on May 28th, 1914, adjudged the appellant unlawfully in the United States in violation of

the Chinese Exclusion Act and ordered his deportation to the country whence he came.

The appellant thereupon filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona, alleging in substance that such finding and order of the Secretary of Labor was against the uncontroverted evidence and without authority in law. The writ having been granted, the appellee made return thereto, setting up the issuance of the warrant of arrest mentioned, the hearing before him and the subsequent order of deportation, and attaching to his return the full evidence taken before him and upon which the order of deportation was based.

The appellant demurred to the return of the appellee upon the grounds that the facts stated in said return do not justify the deportation of the appellant and are not sufficient to show cause why the appellant should not be discharged from detention by the appellee, that the return shows that the appellant was not accorded a fair hearing in that he was arbitrarily found to be unlawfully in the United States without any evidence justifying such finding, and that the order of the Secretary of Labor is and was without jurisdiction. This demurrer was overruled by the District Court, the writ of habeas corpus denied, and the appellant was thereupon remanded to the custody of the appellee. From this judgment, this appeal is prosecuted, and the question therefore presented on this appeal is whether or not the action of the Secretary was fair, regular and lawful, and whether or not the evidence taken before the appellee

and attached to the return and upon which the order of deportation by the Secretary of Labor is based, justifies the finding that the appellant is unlawfully in the United States in violation of the Chinese Exclusion Laws.

The evidence taken at the hearing before the appellee consisted on the part of the Government, solely of the examination of the appellant and of the so-called landing records of the appellant on which he was admitted.

This eviednce showed that the appellant first came to the United States on April 6, 1906, and was admitted at the port of San Francisco as a merchant bearing a Section 6 Certificate duly issued to him by J. G. Lay, Consul-General of the United States at Canton, China. (Tr. R. 92.) The certificate accredits the appellant with having been for the past eight years a member of a mercantile house in China with a capital of two thousand dollars (gold) therein invested, and recites that the Consular Agent has:

> "made a thorough investigation of the statements contained in the foregoing certificate and have found them in all respects true."

That the intention of the appellant appears to have been

> "to set up business as wholesale sundry goods shop at San Francisco," (Tr. R. 94).

And the Consul-General reports to the Commissioner of Immigration that:

> "he intends going to San Francisco to establish a firm engaging in general merchandise business. He will take with him $1,000.00 gold and will have

> $3,000.00 sent him later by draft. His father is also known to have $70,000.00, while the son's personal worth is $50,000.00 Mexican." (Tr. R. 89-90.)

Immediately after the appellant's arrival at San Francisco the earthquake and fire destroyed that city and the appellant moved to Oakland for a year and a few months, (Tr. R. 42) where he procured medicines and Chinese herbs from the Doap Leun Hong store and sold them from house to house. (Tr. R. 42.) He became a partner in that store in July, 1908, investing therein the sum of Five Hundred Dollars brought with him from China, (Tr. R. 43) which interest he still retains. He became a salesman in that store, receiving a salary of four hundred dollars a year. (Tr. R. 44.)

On December 22, 1911, the appellant, deciding to return to China for a visit, made application to the Department for a pre-investigation of his status as a merchant. (Tr. R. 83-86.) This pre-investigation was made (Tr. R. 96-112) with the result that it was found:

> "that he is and has been for more than a year last past a merchant as claimed," (Tr. R. 96-97.)

and his application was approved by the Commissioner in charge. (See the Commissioner's endorsement on bottom of application, Tr. R. 86.)

The appellant thereupon went to China, returning to the United States and again landing at the port of San Francisco, February 4, 1913, when (February 13, 1913) a Certificate of Identity as a merchant was issued to him. (Tr. R. 73-75.) The appellant stayed at the store of which he was a member until February, 1914, when

he went to Phoenix and Mesa, Arizona, "looking for a location to open a store," at which latter place he was arrested upon the warrant of the Secretary issued. It is claimed by the Government, but denied by the appellant, that he became a waiter, laborer, at the latter place and was such when arrested. To support this claim the Government introduced in evidence at the hearing the ex parte statements of Sterling C. Robertson, (Tr. R. 54) and of Louis W. Lowenthal, (Tr. R. 56), both made without the presence of the appellant and prior to the issuance of the warrant, to the effect that they had seen the appellant at work in a restaurant at Mesa for three or four weeks. The appellant claims that the restaurant proprietor was a friend, that he went there on a visit, was not there employed, received no wages, but helped out when they were shorthanded and there was a rush in the business. The evidence for the appellant, independent of his own testimony, shows that he still was a member of the mercantile firm mentioned and was sent to Arizona by its manager as such member to there investigate business conditions and to arrange for agents to handle the goods of that firm and to establish a branch or branches. (Tr. R. 63-69.)

SPECIFICATIONS OF ERRORS.

I.

That the Court erred in overruling complainant's demurrer to the return filed herein by respondent to the writ of habeas corpus, based on the ground that the

facts stated in said return do not justify the detention of complainant by respondent and do not justify the deportation of complainant to the Republic of China by respondent and by the Secretary of Labor.

II.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the facts stated in said return are not sufficient to constitute a defense to the petition for a writ of habeas corpus filed herein, and are not sufficient to show cause why complainant should not be discharged from the detention by the respondent.

III.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the respondent and the Secretary of Labor did not accord to complainant a fair hearing in that they arbitrarily found complainant to be unlawfully in this country in violation of law without any evidence whatsoever having been introduced justifying such finding.

IV.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the detention by the respondent of the petitioner and the order of the Secretary of Labor in ordering the petitioner deported is and was without jurisdiction.

V.

That the Court erred in denying the application of complainant for his discharge under the writ of habeas corpus, in discharging said writ, and in remanding complainant to the custody of respondent.

BRIEF OF THE ARGUMENT.

POINTS AND AUTHORITIES.

a. The action of the administrative officers of the United States, charged with the duty of investigating the status of the alien, determining the status of the alien as one of the exempt class and permitting him to enter the United States, is prima facie evidence of the alien's right to be and remain in the United States.

Lin Hop Fong vs. U. S., 209 U. S. 463.
In re Tam Chung, 223 Fed. 801.

b. The alien's right to enter and remain in the United States, so determined by the administrative officers of the United States, in a proceeding of this character must be overcome by the United States and unless so overcome the alien's right to be and remain in the United States remains proved. (Sec. 3, Act May 5, 1892, casting upon the Chinese alien the burden of the proof, has no application to proceedings upon departmental warrant.)

Lin Hou Fong vs. United States, supra.
Lew Ling Chong vs. United States, supra.
U. S. vs. Lee Yon Wing, 211 Fed 941.

c. The evidence to overcome such prima facie right

so established must be substantial. Mere suspicion, fantastic doubt created, is not sufficient.

d. If in the absence of such substantial evidence the Secretary of Labor order the deportation of an alien such order is arbitrary and unfair, and subject to review and correction on an application for the writ of habeas corpus.

Whitfield vs. Hanges, 222 Fed. 751.
Ex parte Lam Pui, 217 Fed. 458.
M'Donald vs. Sin Tak Sam, 225 Fed 710.

e. "One lawfully entering the United States can lawfully change his vocation and can labor of right and not of privilege and without incurring the penalty of deportation."

In re Tam Chung, 223 Fed. 803.
U. S. vs. Lew Chee, 224 Fed. 447, (C. C. A. 2nd C.)
U. S. vs. Foo Duck, 172 Fed. 856, C. C. A. 9th C.)
Lew Ling Chong vs. U. S., 222 Fed. 196.

f. The warrant contains no allegation of a fact or facts advising the appellant of the charge against him, and did not, therefore, confer jurisdiction upon the Secretary, or invest the subsequent hearing with that fairness exacted by law necessary to constitute due process of law.

Whitfield vs. Hanges, 222 Fed. 748 (C. C. A. 8th C.).
Ex parte Lew Lin Shew, 217 Fed. 317.

g. The ex parte statements of Sterling C. Robertson and Louis W. Lowenthal should not have been received in evidence, and, the finding being based thereon, (Tr. R., bottom page 34 and top page 35) such finding

is vitiated by the reception and consideration of this improper evidence.

Whitfield vs. Hanges, supra.
M'Donald vs. Sin Tak Sam, supra.

h. The proof offered to be *legally sufficient* must be "of such a character and volume that it might well satisfy a rational mind of the truth of the position it is introduced to maintain" and, in determining this, the Court must examine the proof with respect to both its quality and quantity.

Metropolitan R. R. Co. vs. Moore, 121 U. S. 568.

ARGUMENT.

The exempt status of the alien has been formally determined and approved by the administrative officials of the United States, charged with the duty of investigating such status, at least three times.

First,—on his original entry, April 6th, 1906, as a member of the exempt class.

Second,—on his application for pre-investigation as a member of the exempt class prior to his departure from the United States, the application being dated December 22nd, 1911, which was approved January 13th, 1912. This approval followed, as appears from the record, after an active, careful and close investigation by the officers charged with the duty of investigating his status.

Finally, the status of the alien must be deemed to have again been approved by the administrative officials

on his return to the United States as a member of the exempt class.

That this alien was, at the time of his original entry, (April 6th, 1906), a merchant and member of the exempt class is conclusively shown by the evidence and only suspicion without valid reason can impugn his status.

Section Six of the Chinese Exclusion Act, under which he was admitted, requires, first, that the Chinese Government vouch for his status by issuing to him a certificate that he is a merchant, then the

> "diplomatic representative or consular representative whose endorsement is so required is hereby empowered and it shall be his duty before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same."

It must be assumed that J. G. Lay, Consular Agent of the United States, who endorsed the certificate issued to this alien, performed his duty; that he examined "into the truth of the statements as set forth in said certificate" and only upon being satisfied of the truth thereof endorsed the same. This endorsement was made in 1906, the alien's status was then determined by the consular representative charged with the duty of investigation. Shall the propriety of such action of the consular representative be now, after the lapse of many years, questioned? Common justice, it would seem, requires at least sound reason for so doing.

The evidence in the case, the testimony of the alien himself is, that his father was the proprietor of the Yick Woh Drug Store in the Lin Teang Lee village, which is still owned by the family, (Tr. R. 40); that he, at the time of his application to the American Consul for a Section 6 Certificate, was a member of the Hop Lick Drug Store in which he had five thousand dollars invested. There is not a scintilla of evidence in the record to cast doubt upon these assertions, except suspision, based upon racial prejudice, to doubt in toto the assertions of Chinese aliens. If these statements made to the consular representative of the United States at the time of his application for a Section 6 Certificate were true his status as a member of the exempt class is clearly shown and his right to be and remain in the United States is absolute, the Government itself contending that in this preceeding the legality or illegality of the original entry is the sole issue. This Court is asked to declare at this late day that the alien in 1906 was not a merchant, a member of the exempt class, and that the investigation required by law of the consular representative of the United States should have shown that the statements of the alien to the consular agent were untrue.

> "When this young man entered a port of the United States in July, 1899, he presented such certificate duly issued and vised by the consular representative of the United States. Upon application for admission this certification is prima facie evidence of the facts set forth therein. 22 Stat. at L. 58, * 6, Chap. 126, U. S. Comp. Stat. 1901, p. 1307; 33 Stat. at L. 428, Chap. 1630. This cer-

> tificate is the method which the two countries contracted in the treaty should establish a right of admission of students and others of the excepted class into the United States, and certainly it ought to be entitled to some weight in determining the rights of the one thus admitted. While this certificate may be overcome by proper evidence, and may not have the effect of judicial determination, yet, being made in conformity to the treaty, and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported, as in this case, because of wrongfully entering the United States upon a fraudulent certificate, unless there is some competent evidence to overcome the legal effect of the certificate."
>
> Liu Hop Fong v. United States, 209 U. S. 463.

If he was a member of the exempt class his entry was lawful, and if he engaged in manual labor subsequent to his entry such latter fact could only raise a presumption that in truth he was not a member of the exempt class, and, that the Section 6 Certificate was obtained by fraud.

Now, what manual labor did he engage in after his entry and under what circumstances? The facts deny credence to such presumption, the executive findings are to the contrary and do not allow the inference of the presumption. He entered the United States April 6th, 1906, at San Francisco, to establish a store at San Francisco. Immediately thereafter the fire and earthquake occurred in San Francisco and the catastrophe hit hardest that section of San Francisco known as Chinatown. The alien moved to Oakland, where for a time he sold Chinese medicines from the Doap Leun Hong Drug

Store. In July, 1908, he became a member of that firm and ever since has been a member of the firm retaining his membership in the firm, though since his return from China in 1913 he has not been an active member. He paid five hundred dollars for his interest in the firm with money by him brought from China. That the alien brought money with him from China is borne out by the landing record of the officers. Prior to his return to China he was an active partner in the store, a salesman, not engaged in manual labor except that which was necessarily incident to his duty as a merchant. He was an active member of the firm on December 22nd, 1911, when he made an application for pre-investigation on his departure from the United States to the Immigration Inspector in charge.

This pre-investigation is provided for by Rule 15 of the Department of Labor governing the admission of Chinese which provides, substantially:

> "Any Chinese Merchant * * * who desires to go abroad temporarily, may make written application to the Immigration Official * * for pre-investigation of his claim of being a merchant within the meaning of the law.
>
> The officer to whom said application is made shall examine the applicant, such witnesses as he may produce, *and such other witnesses as may be necessary* * * and shall take such other steps as may be necessary and proper to determine whether the applicant's claim is true."

The officer making such investigation forwards the application with a transcript of the testimony to the Immigration officer in charge at the port which latter official

> "shall, upon the receipt of the papers * * return to the officer from whom received the triplicate copy of the application, placing thereon a statement as to whether or not he is satisfied on the evidence presented, to indorse the application favorably."

If such pre-investigation is favorable to the alien the original application is delivered to him and upon his return to the United States is presented to the Immigration officials,

> "and if the officer in charge is satisfied of the identity of such person and nothing has occurred during his absence to discredit the evidence taken on the pre-investigation he shall be promptly admitted without further examination or investigation, except to ascertain from the applicant whether the statutory ground for admission still exists."

(See Rule 15.)

It appears that the pre-investigation prescribed by Rule 15 was most thorough. The Court will take judicial knowledge of the fact that the Chinese aliens are an object of special solicitude by the Chinese Inspectors, that little, if anything, transpires which is not known to the Chinese Inspectors. That the alien in question was well known to the Chinese Inspectors at San Francisco certainly must be true. His conduct in the United States before his departure was not of a clandestine nature. His application for pre-investigation was accompanied by the giving of the names of three white witnesses in support of his claim as a merchant, in addition to the affidavit of the manager of the store of which the alien was a member, which affidavit gave in detail the names of the members of the firm and their investments.

It appears from the Landing Record admitted as an Exhibit that a most thorough departmental investigation was made at that time by the Immigration Officials, (Tr. R. 96 to 112) with the result that on January 13th, 1912, the Commissioner of Immigration in charge endorsed the application for pre-investigation as follows:

> "Port of San Francisco, January 13th, 1912, respectfully returned to the Commissioner of Immigration, Port of San Francisco, Chinese and Immigrant Inspector, with the information that I am now prepared on the basis of the evidence submitted with the original of this application to approve said application.
>
> (Signed) Samuel W. Backus, Commissioner or Inspector in Charge." (Tr. R. 86)

The Landing Record also shows the report of the Chinese Inspector under date of January 12th, which appears to have been an independent investigation by this Inspector and on the strength of which no doubt the commissioner in charge acted in part. (Tr. R. 96) Shall these thorough investigations, which are evidence, and the findings of the officers charged by law with the duty of investigating and determining, now stand for naught? To cast the findings aside must of necessity cast aspersion either upon the fidelity and integrity or upon the ability of the then Immigration Officials.

The law does not so contemplate, but on the contrary accords full credit to these quasi-judicial investigations of the officials, to be ignored in subsequent proceedings only when shown to have been clearly erroneous or obtained by the fraud of the alien.

> "If he was unlawfully within the country in 1910, it was the duty of the officials of the government to have taken steps at that time to have him arrested and deported. The fact that during this long period of inaction the government made no move against him implies a lack of confidence in its case. We are also inclined to attach some importance to the fact that the defendant voluntarily applied to the government officials in 1910 for a certificate to establish his status as a merchant. It is extremely doubtful whether he would have ventured to make such application if he had entertained a doubt as to his ability to establish the facts necessary to sustain his application, with the danger of deportation threatening him if he brought the matter to the attention of the government and failed to secure the certificate."
>
> U. S. vs. Lee Yon Wing, 211 Fed. 941.

Such was the status of the alien upon his departure from the United States at the time of his pre-investigation and upon his return from China on February 4th, 1913. Has his conduct since that date been such as to justify the inference that he was a laborer at the time of his original entry in 1906? We think not. What is there in the evidence to justify such an inference? He remained in San Francisco in the Doap Leun Hong store, under the eyes of the Chinese Inspectors, until February, 1914, three weeks before his arrest, when he came to Phoenix for the purpose of opening a store. Cast all the doubt you please upon the testimony of the alien himself or upon that of the witnesses by him produced, you are not justified in wholly ignoring his evidence. Such doubt can only be resolved into a judicial finding, whether of a Court or of a Departmental

Official, when borne out by some concrete matter of substance in the record. You cannot ignore the evidence favorable to the alien but must accept the same even if only as an explanation of his conduct.

The testimony of the alien is that he came to Phoenix for the purpose of opening a branch store of the Doap Leun Hong Company, the evidence in support thereof, admitted by the affidavits of Ong Seen, the manager of that firm, fully bears out this contention. You are not here concerned with a chinese laborer sought to be deported, who is grabbing at the proverbial straw and pressing a vague claim as a member of the exempt class, but you are confronted with an alien of substance who has been in the United States with the consent and approval of the officials of the United States charged with the duty of investigating him, and admitting or deporting him as the facts might warrant since 1906.

Under these circumstances we do not ask this Court to weigh the evidence, but we do ask this Court in the light of all the evidence, in the light of past actions of the departmental officers, in the light of the law which permitted the merchant to labor and not lose his status if through stress of circumstances he is forced to labor, to examine the record and determine whether or not there is *substantial evidence* in the record sustaining the claim that in 1906 on the day of his original entry the alien was not a member of the exempt class.

Departmental process may warrant the crucifixion of the alien upon, what would in law be deemed, a cross

of errors, but he may not be hung to the tree of suspicion.

At the argument below the trial Court asked what the earthquake and fire at San Francisco had to do with the alien becoming a laborer, we answered and argue here, how many white merchants became laborers, at least for a time, through that cataclysm? As has already been stated, it is well known that that part of San Francisco known as Chinatown was practically destroyed. At the time of his entry the alien had means, this is shown not only by his own evidence but by matter contained in the Government's Landing Record. The alien came to San Francisco, within a few days all opportunity for mercantile endeavor was for a time taken away. He moved to Oakland and sold Chinese medicines. The interpreter used the word "peddler," perhaps truly, but we are not here concerned with his calling after his entry except as evidence to justify the inference that he was not a merchant at the time of his entry. If lawfully admitted as a merchant and impoverished, or opportunity to trade taken away, he might perform the labor of a coolie and not be subject to deportation.

His conduct of nine years ago is questioned. This conduct must have been known to and was affirmatively approved by the Immigration Department at San Francisco. Time and acquiescence must not be denied their probative force.

We earnestly contend that the entire proceedings are invalid because the warrant of arrest, which may be

denominated the pleading, did not advise the appellant of the nature of the charge against him; and, that the finding is invalid because based upon ex parte statements of persons made prior to the issuance of the warrant.

> "An alien, as well as a citizen, is protected by the prohibition of deprivation of life, liberty, or property without due process and the equal protection of the law. This principle is universal. It applies "to all persons within the territorial limits of the United States without regard to any differences of race, of color, or of nationality." Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; U. S. Rev. St. paragraph 1977 (2 Comp. Stat. 1913, paragraph 3925.)
>
> "An alien is entitled to a hearing upon a decision of the charge that he has violated the Acts of Congress and is therfore liable to deprivation of his liberty and deportation, according to "the fundamental principles that inhere in due process of law."
>
> "Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused *shall be notified of the nature of the charge against* him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, *cross-examine the witnesses against him*; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and *based upon the evidence at the hearing*, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it."
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> Whitfield v. Hanges, 222 Fed. 748-749.
> See also: M'Donald v. Sin Tak Sam, 225 Fed. 710.

"The statement in the warrant of deportation that he is unlawfully in this country in that he has been found therein in violation of the Chinese Exclusion Laws, is so broad as to convey absolutely no idea of the specific reason for which the alien has been ordered deported."

Ex parte Lew Lin Shew, 217 Fed. 317.

Respectfully submitted,

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